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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 188.

JOHN NEEL, ADMINISTRATOR OF TOBIAS CLINE, DECEASED, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JUNE 1, 1891.

(14,668.)

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from State court	1	1
Petition	3	1
Summons	7	4
Sheriff's return	7	4
Petition for removal	8	5
Bond for removal	10	6
Order for removal	11	6
Clerk's certificate	12	7
Answer	13	8
Demurrer to answer	14	8
Reply	15	9
Amendment to answer	16	10
Order beginning trial	17	10
Order continuing trial	17	10
Judgment	18	11
Motion for new trial	18	11

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	Original	Print.
Certified copy of order of State court allowing sheriff to file amended return	19	12
Certified copy of sheriff's return	21	13
Certified copy of sheriff's amended return	22	14
Order allowing bill of exceptions	23	15
Bill of exceptions	23	15
Testimony of George Hunt	24	15
Charles Dice	27	17
William Panks	28	18
Rules Nos. 39 and 101	29	19
Testimony of George Moorehouse	29	19
Motion for verdict for defendant	31	19
Ruling on motion for verdict	31	20
Judge's certificate to bill of exceptions	34	21
Exhibit A—Drawing	35	21
Bond	36	22
Writ of error	38	22
Citation	39	23
Assignment of errors	40	24
Clerk's certificate	42	24

1 & 2 UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

At a stated term of the circuit court of the United States for the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the seventh day of said month, in the year of our Lord one thousand eight hundred and ninety and of the Independence of the United States of America the one hundred and fifteenth—present, the Honorable Augustus J. Ricks, district judge—among the proceedings then and there had were the following, to wit:

JOHN NEEL, Administrator of the Estate of Tobias Cline, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant. } Law. No. 4750.

Be it remembered that heretofore, to wit, on the 26th day of December, 1889, there was filed in the clerk's office of said court a transcript of proceedings in the court of the common pleas of Richland county, Ohio; which transcript is in the words and figures following, to wit:

At a court of common pleas of Richland county begun and held at the court-house, in the city of Mansfield, on the second day of December, A. D. eighteen hundred and eighty-nine, the Hon. Manuel May, one of the judges of the second subdivision of the sixth judicial district of Ohio, presiding, amongst the other things had and done at said December term is the following, to wit:

3 JOHN NEEL, Adm'r of the Estate of Tobias Cline, Dec'd,
vs.
THE PENNSYLVANIA COMPANY. } No. 4234. Civil Action.

Be it remembered that heretofore, to wit, on the 9th day of November, A. D. 1889, the plaintiff herein (as adm'r of Tobias Cline, deceased), by his attorney, filed in the office of the clerk of court of common pleas of Richland Co., Ohio, his petition against the defendant herein, and which said petition is in the words and figures as follows, to wit:

In the Court of Common Pleas of Richland Co., Ohio.

JOHN NEEL, Adm'r of the Estate of Tobias Cline, Dec'd, Plaintiff,
against
THE PENNSYLVANIA COMPANY, Defendant. } Petition.

Plaintiff says that he is the duly appointed and qualified adm'r of the estate of Tobias Cline, deceased.

That defendant is a railroad corporation organized under the laws of the State of Pennsylvania, and as such was at the time of

killing of decedent, Tobias Cline, operating a railroad through the State of Ohio and the county of Richland, and ever since has been and still is operating said railroad.

That plaintiff in the month of November, 1887, commenced his action against the defendant for the same cause of action for which this action is brought, which action remained pending until the 21st day of October, 1889, at which time it was dismissed, not
4 upon its merits, but without prejudice to this action. Plaintiff further says that said railroad so operated by defendant passed through the eastern part of the city of Mansfield, a city containing fifteen thousand inhabitants, crossing its east and west streets at an angle of about forty-five degrees, entering said city from the southeast and leaving it at the northwest; that Bloom street, one of the principal streets of said city, crossed said railroad at a point one-third of a mile southeast of defendant's passenger depot and at a point where large factories were built on each side and close to said railroad and on the north side of said Bloom street and close to the same, so that the said railroad was wholly shut off from the view of a person approaching the railroad crossing on Bloom street in all that portion which lay between said crossing and said passenger depot.

Plaintiff further says that the decedent, Tobias Cline, on the 6th day of October, 1887, after dark in the evening, had occasion to, in going to his home, cross over from the west — said railroad crossing at Bloom street, in said city; that at said crossing the said railroad maintained two parallel tracks, one the main track upon which its trains ran, occupying the westerly portion of its right of way, and a track east of that known as the long siding, used for side-tracking trains at Mansfield; that at the time decedent, Tobias Cline, was approaching and had arrived near to said crossing a through freight train running with great speed approached said crossing from the southeast and apparently, to one near the railroad on Bloom street where decedent was, on the main track, but in fact upon the siding. At the same time one of the defendant's trains was approaching said crossing on the main track from towards the passenger depot, running backwards, in such nearness to
5 said crossing that the backing train on the main track and the freight train on the siding would meet near the crossing and both trains would be going over the crossing in opposite directions at about the same time; that as decedent was crossing said main track the defendant carelessly and negligently backed said train onto decedent, Tobias Cline, while he was in the exercise of due care going over said crossing, and killed him. At the time said defendant so carelessly backed said train upon the said Tobias Cline and thus killed him another train was moving across said crossing in the opposite direction at great speed, in violation of the ordinances of the city of Mansfield.

That said defendant, in violation of the ordinances of the city of Mansfield, had carelessly and negligently failed to provide any lights at the said crossing, and the same was totally dark, so that said Tobias Cline could not see the location of said tracks or tell

when he had reached them in crossing; that said defendant carelessly backed said train upon said crossing without having the signals provided for by its rules and by universal custom in railroading, viz., two red lamps on the rear end of the rear car, and without having on said rear end of said train any lights of any kind to distinguish it as the rear end of a train or in any way warn or notify the said Tobias Cline that a train was on said track or moving towards him.

That said defendant negligently ran said train backwards over said crossing in the dark at a dangerous rate of speed, in violation of the ordinances of the city of Mansfield, without placing any watchman or lookout on the rear end of said last car in a position from which he could see and give warning of the approach of said train to the said Tobias Cline or any one happening to be
6 crossing said railroad at said crossing, and while the train passing in the opposite direction was making such noise as would prevent the said Tobias Cline from hearing the signals from said backing train, if any there were, or would cause him to believe that they were signals of the other train.

Plaintiff further says that defendant carelessly — negligently omitted to protect said crossing by watchmen thereat or safety gates, although the same was necessary to the safety of the public, as defendant then well knew.

And plaintiff says the said Tobias Cline was thus run over and killed solely by the negligence of the defendant, as above set forth, and without his fault.

That said Tobias Cline left surviving him a widow and daughter, for whose benefit he prosecutes this suit.

Plaintiff says he has been damaged by the said negligent killing of the said Tobias Cline by the defendant in the sum of $10,000.00, for which sum he asks judgment.

D. DIRLAM,
Att'y for Plaintiff.

THE STATE OF OHIO, }
Richland County, } *ss:*

Personally appeared before me John Neel, plaintiff herein, who, being duly sworn, deposes and says the facts stated in his foregoing petition are each and all true, as he verily believes.

JOHN S. NEEL.

Sworn to before me and subscribed in my presence this 9th day of November, 1889.

E. R. STILSON,
[SEAL.] *Notary Public.*

7 Thereupon, on the precipe of the plaintiff, a summons was issued herein to the sheriff of Richland county, Ohio, and which said summons is in the words and figures as follows, to wit:

THE STATE OF OHIO, }
Richland County, } ss:

To the sheriff of the county of Richland:

You are commanded to notify the Pennsylvania Company that it has been sued by John Neel, administrator of the estate of Tobias Cline, deceased, in the court of common pleas of Richland county, and that, unless it answers by the 7th day of Dec., A. D. 1889, the petition of said plaintiff against it, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 18th day of Nov., A. D. 1889.

Witness John C. Burns, clerk of said court, and the seal thereof, at the city of Mansfield, this 9th day of Nov., A. D. 1889.

JOHN C. BURNS, *Clerk.*

Said summons is endorsed as follows:
"Money only. Damages claimed, $10,000.00."

Afterwards, to wit, on the 13th day of November, A. D. 1889, said summons was returned, endorsed by said sheriff as follows, to wit:

Sheriff's Return.

THE STATE OF OHIO, }
Richland County, } ss:

Received this writ Nov. 9th, A. D. 1889, at 10 o'clock a. m., and, pursuant to its command, I, on the 13th day of Nov., A. D. 1889, served the same on the within-named defendant, The Pennsylvania Company, by delivering personally to M. B. Bushnell, its freight agent, at Mansfield, Ohio, a true and certified copy of this writ, with the indorsements thereon; no superior officer of said company found in my county.

B. FANNERY, *Sheriff,*
By A. B. KEITH, *Dep't.*

8 Afterwards, to wit, on the 21st day of November, A. D. 1889, the defendant herein, by its attorneys, filed in the office of the clerk of court aforesaid its petition herein for the removal of this cause to the circuit court of the U. States for the northern district of Ohio, eastern division, and which said petition is in the words and figures as follows, to wit:

THE STATE OF OHIO, } ss:
Richland County, }

In the Court of Common Pleas.

JOHN NEEL, Adm'r of the Estate of Tobias Cline, Dec'd, Plaintiff,
against
THE PENNSYLVANIA COMPANY, Defendant.

Petition to Remove to the Circuit Court of the United States.

The defendant, The Pennsylvania Company, now comes and for the first time enters its appearance herein and files this its petition to remove this cause from the court of common pleas of Richland county, Ohio, where the same is now pending, to the circuit court of the United States for the northern district of Ohio, eastern division, and for cause says that:

First. The plaintiff was at the time of the commencement of this action and still is a resident of the State of Ohio, in the county of Richland.

Second. The Pennsylvania Company, the defendant herein, is a corporation duly incorporated under and by virtue of the laws of the State of Pennsylvania and was at the commencement of this action and still is a citizen of that State, and was not then, nor has it ever been, a citizen of the State of Ohio.

9 Third. The matters in controversy in this suit are wholly between citizens of different States, and the amount in dispute, exclusive of costs, exceeds the sum of two thousand dollars and is to recover the sum of ten thousand ($10,000.00) dollars.

Fourth. This defendant says that it is ready and willing to give bond, with good and sufficient surety, for the performance of all acts and things required of it by the provisions of the law relating to the removal of causes from State courts to the circuit court of the United States, and herewith offers such bond, conditioned and executed as aforesaid. Wherefore defendant prays that said bond may be accepted as good and sufficient surety, according to the said provisions of law, and that the said suit may be removed to the circuit court of the United States for the northern district of Ohio, eastern division, and that no further proceedings be had therein in this court.

J. R. CAREY AND
W. C. BOYLE,
Att'ys for Defendant.

THE STATE OF OHIO, } ss:
County of Mahoning, }

W. C. Boyle, being first duly sworn, says that he is the attorney of said defendant and that he believes the allegations of the foregoing petition to be true.

W. C. BOYLE.

Sworn to before me and by him, the said W. C. Boyle, subscribed in my presence this 18th day of November, 1889.

A. O. FORDING,
Notary Public in and for said County.

10 Also on the aforesaid 21st day of Nov., A. D. 1889, came the defendant herein, by its attorneys, and filed in the clerk's office aforesaid its bond herein for the removal of this cause to the United States circuit court, and which said bond is in the words and figures as follows, to wit:

THE STATE OF OHIO, } ss:
Richland County, }

In the Court of Common Pleas.

JOHN NEEL, Adm'r of Tobias Cline, Dec'd. } Bond for Removal to
against } United States Cir-
THE PENNSYLVANIA COMPANY. } cuit Court.

Know all men by these presents that we, Martin B. Bushnell, S. M. Douglass, and A. A. Douglass, are held and firmly bound unto John Neel, adm'r, of Richland county, Ohio, in the sum of three ($300,00) hundred dollars, lawful money, to — paid to said John Neel, adm'r, his successors or assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

The condition of this bond is such that whereas the said John Neel, adm'r, did on the 9th day of November, 1889, file his petition in the court of common pleas of Richland county Ohio, against the said Pennsylvania Company to recover the sum of ten thousand dollars ($10,000,00); and

Whereas the same is now pending in said court of common pleas and the said Pennsylvania Company, defendant in said action, has this day filed its petition in said court to remove said action therefrom to the circuit court of the United States for the northern district of Ohio, eastern division:

11 Now, if the said defendant, The Pennsylvania Company, shall enter in said circuit court on the first day of its next term a copy of the record in said suit so commenced by the said John Neel, adm'r, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that this suit has been improperly or wrongfully removed thereto, and shall there appear and enter special bail in the said suit, and shall do or cause to be done such other appropriate acts as by the acts of Congress providing for the removal of causes from the State courts to the circuit courts of the United States may be required to be done by it, then the above obligation is to be null and void; otherwise to be and remain in full force and effect.

Witness our hands and seals, at Mansfield, O., this 18th day of Nov., A. D. 1889.

MARTIN BUSHNELL. [SEAL.]
A. A. DOUGLASS. [SEAL.]
S. M. DOUGLASS. [SEAL.]

The above bond is hereby accepted and approved. Dated this 21st day of Nov., A. D. 1889.

JOHN C. BURNS, *Clerk.*

Afterwards, at the December term, A. D. 1889, to wit, on the 3rd day of December, A. D. 1889.

JOHN NEEL, Adm'r of the Estate of Tobias Cline, Dec'd, *vs.* THE PENNSYLVANIA COMPANY.	No. 4234. Civil Action. (Motion Docket.)

The defendant herein having within a time provided by law filed its petition for the removal of this cause to the circuit court of the United States for the northern district of Ohio, eastern division, and having at the same time offered good and sufficient surety pursuant to the statutes thereof, the court, finding that the defendant
12 is a resident of the State of Pennsylvania, and that it is entitled to such removal, does hereby accept said petition and bond, and orders that the said cause be removed for trial into said circuit court of the United States pursuant to the statutes of the United States, and all further proceedings in said cause are hereby stayed.

Costs of Richland County Common Pleas Court.

Pff's costs:

Clerk Burns	$3 64	
Sheriff Flannery	77	
E. R. Stilton, N. P.	40	
		4 81

Def't's costs:

Clerk Burns	$4 06	
Sheriff Flannery	06	
		4 12
		$8 93

THE STATE OF OHIO, } ss:
Richland County, }

I, John C. Burns, clerk of the court of common pleas within and for the county of Richland, do hereby certify that the foregoing is a true copy of the whole record of the proceedings of said court in the suit wherein John Neel, adm'r of Tobias Cline, deceased, is plaintiff and The Pennsylvania Company is defendant, as the same remains of record in this office and in my custody.

In witness whereof I have hereto set my hand and affixed the seal of the said court of common pleas, at Mansfield, Ohio, this 13th day of December, A. D. 1889.

JNO. C. BURNS,
Clerk of the Court of Common Pleas.

[SEAL.]

Transcript endorsed: John Neel, adm'r of Tobias Cline, deceased, *vs.* Pennsylvania Company. Transcript of record. Filed Dec. 26, 1889. M. W. Sanders clerk.

13 And afterwards, to wit, on the 26th day of December, A. D. 1889, an answer was filed in said cause; which answer is in the words and figures following, to wit:

In the Circuit Court for the Northern District of Ohio, Eastern Division.

JOHN NEEL, Adm'r of the Estate of Tobias Cline, Deceased,
vs.
THE PENNSYLVANIA COMPANY. } Answer.

The defendant, for answer to the petition of the plaintiff filed herein, says it admits its corporate existence and the operation of a line of railroad, as alleged in said petition. It admits that said Cline received certain injuries on the day named in the petition, which resulted in his immediate death; but it denies each and every other allegation of the petition.

For a second defence, the defendant adopts and makes a part hereof all the allegations and admissions of its first defence, and says that said injuries and death were caused solely by the failure on the part of said decedent to exercise ordinary care.

For a third defence, the defendant says that the cause of action in the petition set forth did not accrue within two years next before this action was begun.

J. R. CAREY,
Atty for Def't.

STATE OF OHIO, }
Columbiana County, } *ss:*

J. R. Carey, being duly sworn, says that he is attorney for the defendant, Pennsylvania Company, and that the allegations of the foregoing answer are true, as he verily believes.

J. R. CAREY.

14 Sworn to and subscribed before me this twenty-fourth day of December, 1889.

W. C. BOYLE,
Notary Public. [SEAL.]

Answer endorsed: United States circuit court. John Neal, adm'r of Tobias Cline, deceased, *vs.* Pennsylvania Company. Answer. Filed Dec. 26, 1889. M. W. Sanders, clerk.

And afterwards, to wit, on the 30th day of December, 1889, a demurrer was filed in said cause; which demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

JOHN NEAL, Administrator of Tobias Cline, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant. } Demurrer.

The plaintiff demurs to the third defense of defendant's answer because it does not state facts sufficient to constitute an answer to plaintiff's petition.

D. DIRLAM,
Att'y for Plaintiff.

Demurrer endorsed: United States circuit court, northern district of Ohio, eastern division. John Neal, administrator of Tobias Cline, dec'd, *vs.* The Pennsylvania Company. Demurrer. Filed Dec. 30, 1889. M. W. Sanders, clerk.

15 And afterwards, to wit, on the 30th day of December, A. D. 1889, a reply was filed in said cause; which reply is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

JOHN NEAL, Administrator of Tobias Cline, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant. } Reply.

For reply to the second defense in defendant's answer plaintiff says it is not true that said death or injuries were caused in any degree by the want of ordinary care on the part of the decedent, Tobias Cline.

D. DIRLAM,
Att'y for Plaintiff.

THE STATE OF OHIO, }
Richland County, } *ss:*

Personally appeared before me John Neal, plaintiff, who, being duly sworn, deposes and says the allegations of his foregoing reply are true as he verily believes.

JOHN NEEL.

Sworn to before me and subscribed in my presence this 28 day of December, 1889.

HOWARD B. DIRLAM,
[SEAL.] *Notary Public, Richland County, Ohio.*

Reply endorsed: United States circuit court, northern district of Ohio, eastern division. John Neal, administrator of Tobias Cline, plaintiff, *vs.* The Pennsylvania Company, defendant. Reply. Filed Dec. 30, 1889. M. W. Sanders, clerk.

16 And afterwards, to wit, on the 6th day of January, A. D. 1890, an amendment to answer was filed in said cause, which is in the words and figures following, to wit:

In the Circuit Court for the Northern District of Ohio, Eastern Division.

JOHN NEAL, Adm'r of the Estate of Tobias Cline, Deceased, *vs.* THE PENNSYLVANIA COMPANY. } Amendment to Answer.

The defendant, for an amended third defense to plaintiff's petition, denies that plaintiff in the month of November, 1887, or at any time commenced an action against this defendant for the same cause of action for which this action is brought, or that any such case was begun or was dismissed, not upon its merits, but without prejudice to this action as alleged in said petition.

And the defendant further says that the cause of action in said petition set forth did not accrue within two years next before this action was begun.

J. R. CAREY,
Att'y for Def't.

STATE OF OHIO, *Columbiana County,* } *ss:*

J. R. Carey, being first duly sworn, says that he is attorney for the defendant, The Pennsylvania Company, and that the allegations of the foregoing amendment to answer are true as he verily believes.

J. R. CAREY.

Sworn to and subscribed before me this fourth day of January, A. D. 1890.

[SEAL.] WM. C. BOYLE,
Notary Public.

Amendment to answer endorsed: John Neal, adm'r, *vs.* The Penna. Co. Amendment to answer. Filed Jan. 6, 1890. M. W. Sanders, clerk.

17 And afterwards, to wit, on Monday, the 13th day of October, A. D. 1890, the Honorable Augustus J. Ricks, district judge, presiding, the following order was made in said cause, to wit:

JOHN NEEL, Adm'r, *vs.* THE PENNSYLVANIA COMPANY. } Law. No. 4750.

This day came the parties, by their counsel, and a jury, being called, came, to wit, James Charters, John F. Moore, J. T. Bruce, John McNamara, C. T. Beckwith, H. C. Gray, David Bush, Jacob Mandlebaum, Charles S. Underhill, A. Cunningham, Andrew

Donnenwirth, and John Rudebaugh, who, being duly elected, were duly empanelled and sworn to well and truly try the issues joined between the parties at bar of court; and thereupon the trial of this case proceeded. The testimony on behalf of plaintiff was begun, but not closed, when further proceedings in this behalf were postponed until tomorrow morning.

And afterwards, to wit, on Tuesday, the 14th day of October, A. D. 1890, the following order was made in said cause, to wit:

JOHN NEEL, Adm'r,
vs.
THE PENNSYLVANIA COMPANY. } Law. No. 4750.

This day again came the parties, by their counsel, and came also the jury as heretofore duly empanelled and sworn herein; and thereupon the trial of this case proceeded. Plaintiff's testimony-in-chief was closed; whereupon defendant moved the court to instruct the jury to return a verdict for the defendant and same was argued by counsel; whereupon court took the same under advise-
18 ment and further proceedings in this case were postponed until tomorrow morning.

And afterwards, to wit, on Wednesday, October 15th, A. D. 1890, the following order was made in said cause, to wit:

JOHN NEEL, Adm'r,
vs.
THE PENNSYLVANIA CO. } Law. No. 4750.

This day again came the parties, by their counsel, and came also the jury as heretofore duly empanelled and sworn herein, and the court, having fully considered defendant's motion to instruct the jury to return a verdict for the defendant, sustains said motion and instructed the jury to return a verdict for the defendant, which was accordingly done; to which action of the court plaintiff excepts, and the said plaintiff having filed a motion to set aside the verdict of the jury and for a new trial herein said motion came on for hearing and, upon consideration by the court, it is ordered that said motion be overruled, to which ruling of the court plaintiff excepts. It is thereupon ordered that plaintiff pay costs of this suit, to be taxed, and in default of payment execution issue.

And on the 15th day of October, A. D. 1890, and after verdict and before judgment, the plaintiff filed a motion for a new trial in this cause; which motion is in the words and figures following, to wit:

In the United States Circuit Court for the Northern District, Eastern Division of Ohio.

JOHN NEAL, Administrator of Tobias Cline, Dec'd, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant.
} Motion for a New Trial.

The plaintiff moves the court to set aside the verdict of
19 the jury and grant him a new trial because—

1st. The court erred in sustaining the motion of the defendant to instruct the jury to return a verdict for the defendant.

2nd. The court erred in instructing the jury to return a verdict for the defendant.

3rd. The verdict of the jury is against the law of the case.

4th. The court erred in instructing the jury that the plaintiff's decedent, as a matter of law, was guilty of such contributory negligence as to defeat a recovery in this case.

D. DIRLAM,
Att'y for Plaintiff.

Motion for new trial endorsed: John Neal, adm'r of Tobias Cline, *vs.* The Penna. Co. Motion for a new trial. Filed Oct. 15, 1890. M. W. Sanders, clerk.

And afterwards, to wit, on the 17th day of October, A. D. 1890, there was filed in said cause a certified copy of a journal entry made in the court of *court of* common pleas of Richland county; which copy is in the words and figures following, to wit:

THE STATE OF OHIO, } *ss:*
Richland County, }

In Common Pleas Court, Sept. Term, 1889.

Journal, vol. 43, page 568.

JOHN S. NEAL, Adm'r of Tobias Cline, Dec'd, Plaintiff,
against
THE PENNSYLVANIA R. R. Co., Defendant.
} Certified Copy of Journal Entry. Civil Action.

At a court of common pleas begun and held at the court-house,
in the town of Mansfield, in the county and State aforesaid,
20 on the 2nd day of September, in the year of our Lord one thousand eight hundred and eighty-nine, to wit, on the 26th day of October, A. D. 1889.

Present: Hon. Manuel May, judge of said court.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

JOHN S. NEAL, Adm'r of Tobias Cline, Dec'd, } No. 3422. Civil
vs. } Action. (Mo-
THE PENNSYLVANIA R. R. Co. } tion Docket.)

This day came B. Flannery, sheriff of Richland county, Ohio, and asked leave to amend his return in the above-entitled cause to show that the summons in said case was served on W. H. De Long, ticket agent of the Pennsylvania Company at Mansfield, Richland county, and the court, being fully advised in the premises, do grant leave to the said B. Flannery, sheriff, to so amend his return.

Thereupon came the said B. Flannery, sheriff of Richland county, and filed his amended return, which is duly entered upon the appearance docket in said case.

THE STATE OF OHIO, } *ss:*
Richland County, }

I, John C. Burns, clerk of the common pleas court within and for said county and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the Journal, vol. 43, page 568, of the proceedings of the common pleas court within and for said county, and that said foregoing copy has been compared by me with the original entry on said Journal, and that the same is a correct transcript thereof.

21 In testimony whereof I do hereby subscribe my name officially and affix the seal of said court, at the court-house, in Mansfield, in said county, this 9th day of Oct., A. D. 1890.

[SEAL.] JNO. C. BURNS, *Clerk.*

And afterwards, to wit, on the 17th day of October, A. D. 1890, a certified copy of a sheriff's return was filed in said cause; which copy is in the words and figures following, to wit:

THE STATE OF OHIO, } *ss:*
Richland County, }

Sheriff's Return.

Received this writ November 14, A. D. 1887, at 10 o'clock a. m., and, pursuant to its command, I, on the 17th day of November, A. D. 1887, served the same on the within-named defendant, The Pennsylvania Railroad Company, by delivering personally to W. H. De Long, ticket agent for said company at Mansfield, Ohio, a true and certified copy of this writ, with the endorsements thereon. The reason for serving said ticket agent, no superior officer of said company found in Richland county, Ohio.

I therefore make this my return November 18th, 1887.

B. FLANNERY, *Sheriff,*
By WM. O'HEARN, *Deputy.*

Certificate of Copy.

THE STATE OF OHIO, } ss:
Richland County, }

I, John C. Burns, clerk of the court of common pleas within and for the aforesaid county and State, do hereby certify that the foregoing is a true and correct copy of the original return of sheriff now on file in said clerk's office in the cause of John Neal *vs.* The Pennsylvania Railroad Co.

22 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Mansfield, O., this 9th day of Oct., 1890.

[SEAL.] JNO. C. BURNS, *Clerk.*

Afterwards, to wit, on the 17th day of October, A. D. 1890, a certified copy *a* an amended sheriff's return was filed in said cause; which copy is in the words and figures following, to wit:

THE STATE OF OHIO, } ss:
Richland County, }

Sheriff's Return.

Received this writ November 14th, A. D. 1887, at 10 o'clock a. m., and, pursuant to its command, I, on the 17th day of November, A. D. 1887, served the same on the within-named defendant, The Pennsylvania Railroad Company, by delivering personally to W. H. De Long, agent for the Pennsylvania Company at Mansfield, Ohio, a true and certified copy of this writ, with the endorsements thereon. The reason for serving said ticket agent, no superior officer of said company found in Richland county. I therefore make this my return Nov. 18th, 1887.

B. FLANNERY, *Sheriff,*
By WM. O'HEARN, *Dep.*

Certificate of Copy.

THE STATE OF OHIO, } ss:
Richland County, }

I, John C. Burns, clerk of the court of common pleas within and for the aforesaid county and State, do hereby certify that the foregoing is a true and correct copy of the original amended sheriff's return now on file in said clerk's office in the cause of John S. Neal *vs.* The Pennsylvania Railroad Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Mansfield, Ohio, this 9th day of Oct., 1890.

[SEAL.] JNO. C. BURNS, *Clerk.*

23 And afterwards, to wit, on Monday, the 2nd day of February, A. D. 1891, an order was entered in said cause; which order is in the words and figures following, to wit:

JOHN NEEL, Adm'r,
vs.
THE PENNSYLVANIA COMPANY. } Law. No. 4750.

This day came the plaintiff and presented his bill of exceptions and prayed the court to allow, sign, and seal the same, and the court, finding said bill of exceptions to be true, do allow, sign, and seal the same and, on motion of the plaintiff, order the same to be made a part of the records in this case. Thereupon plaintiff filed the same. All of which is done this 2nd day of February of the October term of this court.

And afterwards, to wit, on the 2nd day of February, A. D. 1891, a bill of exceptions was filed in said cause, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern Dist. of Ohio, Eastern Division.

JOHN NEAL, Adm'r of Tobias Cline, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that at the October term of the said court, A. D. 1890, the Honorable Augustus J. Ricks, district judge, presiding as judge of said circuit court, the above-entitled cause came on for trial to a jury, and, the jury having been duly empanelled and sworn according to law, the plaintiff, to maintain the
24 issue on his part, introduced sundry witnesses, who, being first duly sworn, gave testimony to prove all the allegations of the plaintiff's petition, except the circumstances connected with and surrounding the alleged negligent killing by the defendant of Tobias Cline; and thereupon, further to maintain the issue on his part, introduced as a witness—

GEORGE HUNT, who, being duly sworn, testified as follows:

I live in the city of Mansfield and have for the last forty years; know the decedent, Tobias Cline. He was killed on October 6, 1887. I am employed at Ellsworth's bending works. (Locates said works on the map which is hereto attached and made a part hereof, marked "Exhibit A;" also the railroad operated by the defendant and the angle with which it crosses Bloom street, in said city, the locations of the various shops and buildings marked thereon, and the shops and grounds adjacent to the crossing.)

And said witness further testified to the jury: I was employed at Ellsworth's bending works, whose grounds are bounded on the south by Bloom street, on the northeast by the right of way occupied by the defendant, as shown on said map. The Schreider & Miller hardware manufactory was located directly east of the said bending works and bounded on the southwest by said right of way, on the south by Bloom street, as shown by said map. The Baxter stove works was located on the south side of the street and Hum-

phries pump works on the north. I was unloading lumber from a box car on Schreider & Miller's side track. Charles Dice was with me. William Mills was in the car, handling the lumber. We had a lantern in the car, which was a box car, and on the east side of the siding, and the team was standing between this car and the long siding. The team was standing between — box car and the long siding, heading towards the crossing. There are two tracks at the Bloom-street crossing and a spur at Schreider & Miller's.

25 After we had loaded the wagon we waited for the freight train which was going east on the main track. After it had passed I walked ahead and told Dice to drive over with the team. We crossed Bloom street at this crossing and drove into the yard at the bending works. The wagon stopped about 80 feet from the track and about six feet from the sidewalk, and while standing there I saw a person going east on the north side of Bloom street. He was six or eight feet from me. I noticed a train going west on the long siding or easterly track at this time and a shifter coming east on the main track. I paid no more attention to the train. The next thing that attracted my attention, some one called out that a man was killed. I immediately ran over to the railroad. The shifter was standing on the crossing. I saw the deceased, Mr. Cline. I recalled then that Cline was the man I saw pass before. I saw him lying on the track with his head against the east rail and towards the west. His feet were inside the rails; his whole body between the two rails of the most westerly track—the main track. I found a piece of chain on his vest; found his watch on the Bloom-street crossing about 30 feet from the body. I did not see his hat picked up. His pocket-book was found on the crossing under the engine, and the engine had passed over where he lay twice, once going and once coming. I went back the next morning and found on Bloom-street crossing some marks on the track which indicated that something had been dragged. Blood was on the rails and pieces of cloth. The marks began about the middle of the crossing. The first blood that I saw was about 30 feet east of the crossing. I worked near these tracks about four years. I think I have had sufficient experience to enable me to judge of the speed of trains. I think the shifter ran about 18 or 20 miles an hour. It had two or three box cars in front of it and was shoving the cars. I did not notice any signal lights, either red or green, on these cars. I saw no lights on the box cars. I saw one light on the front of

26 the engine and one on the tender in the rear. The headlight on the shifter reflected against the box car and threw light right and left. I had known Cline about 12 or 20 years. His family had dealt with me as grocer. He was a good provider; had a fine home; was grading and paving streets. Cline & Hamline was the firm. He was gray-haired. I don't know his age. I did not examine the car to look for marks. It had been taken away. Cline left a wife and one daughter. A man by the name of Smith had a coal yard on the east side of the railroad. When we found Cline his watch was running. By it it was 8 o'clock and 30 minutes p. m.

Cross-examination:

I was on the west side of the track while unloading the car, about 60 or 80 feet from the track and about six feet from Bloom street. The sidewalk was on a level with the ground where I was. When Cline passed me the freight train going west was about half way over the Bloom-street crossing. The shifter was two blocks away; the shifter was in plain sight for two blocks west. I saw both trains from there. I estimated the speed of the shifter as it crossed Bloom street. Cline lived above there, on Third street, for about five years. Trains ran as frequently during those five years as now; trains pass about every half hour. I heard the report that a man was killed three or five minutes after I saw — man pass where I was. He would have to walk 60 or 80 feet, while the shifter would have to run 300 feet. This was a very busy crossing—not at this time of the evening. There was an oil lamp at Bloom-street crossing, but could not say whether it was lighted or not. After the man passed I noticed the trains. Train was half over Bloom-street crossing when this man passed me. This shifter was coming down on the main track, about two blocks away. Freight train had 20 or 25 cars. The shifter was in plain sight during that whole
27 distance. I was not paying any attention to other trains. Shifter liable to move over crossing at any time over any track; shifting and running of cars about the same during five years. There was no fence between me and Bloom street.

It is conceded by counsel that the green lines on the bending works lot on the map hereto attached do not indicate buildings, and that there were no buildings to obstruct the view of the railroad track westward of a traveler approaching the crossing on Bloom street from the west as he passed the bending work- lot, a distance of 80 feet from the crossing.

Further to maintain the issue on his part plaintiff offered CHARLES DICE as a witness, who testified as follows:

I remember the night that Cline was killed. I was unloading strips in bending works. I saw a man walking towards the railroad. The shifter was coming down the track. I knew Cline. After he crossed Mills called out to me a man was hurt, and I went over to the railroad. The switch-engine was close to the crossing; found Mr. Cline about 30 feet east of the crossing, lying between the rails of the main track. We found his pocket-book and watch; can't say where they were laying. Shifter had empty box cars and was taking them to Strong's warehouse, on East Fourth street. When we found Cline the shifter had disposed of the cars and come back to the crossing. There was one light at the crossing, a gas lamp, and it was lighted. I heard the shifter as the man passed me. The shifter was about 40 feet west; heard the noise of the running cars. I could not tell the speed, but cars made considerable noise. The noise attracted my attention; no other noise about there to attract my attention. The man had to leave the sidewalk

to get onto a bridge, which was about six feet from the first
28 track; bridge six feet wide. It was five or six minutes from
the time the man passed me until the shifter passed over the crossing. One would have to come in from the sidewalk to get over the bridge.

Further to maintain the issue on his part plaintiff offered WILLIAM BANKS as a witness, who testified as follows:

I am a brother-in-law of Tobias Cline. I worked at the Baxter stove works. My attention was called to the accident soon after it happened. He was then at the depot. He was badly torn up and was dead. His clothes were torn from his body. I went to the crossing the next morning and saw where he was killed. I found the first marks of blood 30 or 40 feet east of the crossing; found blood on the crossing a little east of the center. Marks of dragging began where I first saw blood; pieces of flesh and hair on the ties; trail ended at a little pool of blood 30 or 40 feet east from the crossing. I went down to Strong's warehouse and found blood, hair, and ravelings of clothes on the box car on a piece of iron connected with the brake. Mr. Cline was a contractor; had a stone quarry; was a very industrious man; 55 years old. There was one watchman at the crossing; no gate. He had been to Marion that day to buy macadam for the street. He came back on the Lake Erie & Western after dark. There is a pathway from the end of defendant's platform, on the west side of its railroad, that he could have followed down to the north end of Water street; thence along Water to Bloom; thence east on Bloom to the railroad crossing. From there he could have gone down Foster street, which goes southeast on the eastern side of the railroad to an alley; then out through the alley to Fourth street; thence crossing to his home, on Third street; or he could have continued east on Bloom street to Wayne and then south on Wayne to Fourth. It is the shortest and most
direct way down from the depot to Cline's house. He could
29 have left the depot going west on the railroad grounds to East Diamond street; then followed that south to Bloom, Fourth street, or Third street; but if he had gone south of Bloom street he would have to go up and down the hill, while by following Bloom the way was level—he had no hills. Humphrey's pump works had from 75 to 100 hands; Baxter, 100; Schroider & Miller, 60 hands, and I do not know how many the other factories employed, but a good many. The bending works, Aultman & Taylor's threshing-machine & engine works, the Mansfield Buggy Company employed a large number of hands each. The usual way for him to go home was east on Bloom street over defendant's crossing.

Cross-examination:

The railroad track is used a great deal there. Via the railroad track was the shortest way to Cline's home from the depot.

Plaintiff then offered rules No. 30 and 101 of the defendant railroad company, as follows:

Rule No. 30. Each train, when running after sunset, will display two or more lights on the rear and will carry green lights on each side of the hind car as markers, showing where the rear end of the train is.

Rule No. 101. Switching-engines will not carry markers, but, when going any considerable distance, will carry green lights.

Further to maintain the issue on his part plaintiff next offered GEORGE MOOREHOUSE as a witness, who testified as follows:

I have been over the ground three times with Mr. Dirlam for the purpose of examining it. The first time was shortly after Cline's death. I have been acquainted with it a good many years. Where defendant's road crosses Bloom street there are the usual crossings down, consisting of timbers on each side of the rails and filled in to make smooth crossings. The timbers in the main track
30 look old and somewhat decayed, as if they had been there a good while. I know the crossing had been there as much as eight years before Cline's death. The bolt works, now Schreider & Miller's hardware manufactory, had been there a good while. Smith had a coal yard in there, and afterwards Baxter and Humphries came in. Bloom street, east of the crossing, had been worked by the city—that is, put in gas and water. The street had been worked by Street Commissioner Scott. The houses on Foster street, in West's addition were old houses and had been there a good while. The chief way to go west from Baxter's off the railroad was over Bloom-street crossing. Bloom street runs out and ends at Baxter's; it is not built up any further east than Baxter's. You could go down Foster back to Wayne and get over into Fourth, but west, on Bloom, was the usual route. The map shows the location of various manufactories and business places in that part of the city. The Baltimore & Ohio yard is along Main street and south of the railroad crossing. The defendant's yard is where the railroad crosses Main street. The yard of the Lake Erie & Western is east of the depot. You cannot go to the depot by any street nearer than East Diamond street. The main street of the city is the next street west of East Diamond.

Cross-examination:

The Pennsylvania Company has spur tracks leading into the various manufacturing establishments. The path leading from the depot is interrupted by tracks at Orange street. There is a well-defined path between the tracks from Orange to Bloom streets. The grade up East Diamond street is a regular grade, I presume. The switches about Bloom street are in the yard. The main track indicated on map is the most westerly track of the two.

31 And the above was all the evidence given to the jury on the subject of the death of Tobias Cline, the manner in which he was killed, and the circumstances and surroundings under which

it occurred, and of the locality, vicinity, and surroundings, the streets, factories, and their locations, and the railroad operated by defendant.

And thereupon the defendant, by its attorneys, made a verbal motion to the court to direct the jury to return a verdict for the defendant on the sole ground that the plaintiff in the above-recited testimony introduced by him has established such contributory negligence on the part of the decedent, Tobias Cline, as to preclude the plaintiff from recovery in this case.

And after argument the court found and held that, as to matter of law, said evidence did establish such contributory negligence on the part of Tobias Cline, directly contributing to his death, as to preclude the plaintiff from recovery therefor.

And the court further found that the plaintiff, on all other branches of his case except as to contributory negligence, had given to the jury sufficient evidence to *prima facie* establish the said other branches of his case, and the evidence thereon was sufficient to be admitted to the jury and to be determined by them as questions of fact.

And thereupon the court sustained said motion of the defendant in the following words:

The plaintiff having closed his testimony, the defendant now moves the court to instruct the jury to return a verdict for the defendant. It is a well-settled rule in this court that where the testimony is of a character that if a verdict was returned under it for the plaintiff and the court would feel compelled to set such
32 verdict aside, then it is the duty of the court to instruct the jury to return a verdict for the defendant.

As the Supreme Court of the United States has well expressed it, the defendant has a right under such condition of the testimony to have a verdict returned in its favor, as a matter of law, without incurring the risk of having it submitted to a jury and a verdict returned against it based upon prejudice or ignorance.

I have carefully considered the testimony in this case and it appears very evident to me that the plaintiff on approaching defendant's tracks at this crossing had a full and fair opportunity of both seeing and hearing trains approaching from either direction. The testimony of the witnesses Hunt and Dice shows that, although engaged in their occupation of unloading and reloading lumber, they distinctly heard the freight train approaching on the siding from the east and Hunt saw the shifter coming down the main track from the west. It seems that the decedent at any point within 80 feet of the tracks had an unobstructed view of the railroad to the westward for a distance of at least two blocks, and it further appears that he lived in this immediate vicinity and was familiar with this crossing and all its surroundings, and it further appears that before stepping upon the railroad tracks it was necessary for him to leave the sidewalk and move over a bridge immediately next to the tracks, so that he must have known he was approaching a railroad crossing. But, according to the averment in the petition by the plaintiff,

he says that at the time the defendant carelessly backed its shifting engine upon the said Cline and thus killing him "another train was moving across the said crossing in an opposite direction at great speed and in violation of the ordinances of the city of Mansfield." According to this averment, while decedent was undertaking to cross defendant's tracks going eastward a railroad train was at the time actu-
:33 ally crossing immediately in front of him on the second track. It could not, therefore, have been his intention to cross the defendant's tracks; it evidently was his purpose to move along defendant's tracks in the direction of his house on the main track upon which the shifting engine and cars were moving, the marks upon the track mentioned in the testimony indicating that either just as he stepped upon the track or after he had proceeded some little distance on it in the direction of his home he was overtaken and struck by the shifting engine. He had the same means of observation that Hunt and Dice had and could have seen and heard. He could have seen this shifter and cars for a distance of two blocks if he had looked west, and if he had used the ordinary care which a prudent man would have used under the circumstances he must have seen it.

I am aware that the Supreme Court of the United States in the cases reported in the 128th United States have decided that the question of contributory negligence should be submitted to the jury unless the evidence is so conclusive as to compel the court to set aside the verdict if one was rendered. I find that in this case there is such conclusive evidence of contributory negligence as would compel me to set aside a verdict if one was returned upon it in favor of the plaintiff. Therefore defendant's motion to instruct the jury to return a verdict is allowed and the jury will accordingly return a verdict for the defendant.

To which ruling of the court in sustaining said motion of the defendant the plaintiff, by his counsel, at the time excepted, and to the direction of the court *the* to the jury to return a verdict for the defendant the plaintiff, by his counsel, at the time excepted; and thereupon the jury did return a verdict for the defendant, as
:34 appears of record in this case, and on the same day the plaintiff filed his motion for a new trial, which was then and there overruled; to which ruling of the court in overruling his motion for a new trial the plaintiff, by his counsel, at the time excepted.

Wherefore the plaintiff prays the honorable court to allow, sign, and seal this his bill of exceptions on his motion and order the same to be made a part of the record in this case, all of which is accordingly done at said October term, A. D. 1890.

AUGUSTUS J. RICKS, [SEAL.]
District Judge, Sitting in Circuit Court.

(Here follows diagram marked p. 35.)

36 And afterwards, to wit, on the 25th day of April, A. D. 1891, a bond was filed in said cause; which bond is in the words and figures following, to wit:

Know all men by these presents that we, John Neal, as administrator of the estate of Tobias Cline; D. Dirlam, and Howard B. Dirlam, are held and firmly bound unto the Pennsylvania Company in the full and just sum of five hundred dollars, to be paid to the said The Pennsylvania Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a term of the circuit court of the United States for the northern district of Ohio, in a suit depending in said court between John Neal, administrator of the estate of Tobias Cline, deceased, as plaintiff, and The Pennsylvania Company, as defendant, a judgment was rendered against the said John Neal, administrator, and the said John Neal, administrator, &c., having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Pennsylvania Company citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the 25th of May next:

Now, the condition of the above obligation is such that if the said John Neal, administrator of the estate of Tobias Cline, deceased, shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be
37 void; else to remain in full force and virtue.

JOHN NEAL. [SEAL.]
As Administrator of Tobias Cline,
Per D. DIRLAM.
D. DIRLAM. [SEAL.]
HOWARD B. DIRLAM. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
AUGUSTUS J. RICKS,
U. S. Dist. Judge.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you as judge, between John Neel, administrator of the estate of Tobias Cline, deceased, as plaintiff, and The Pennsylvania Company

as defendant, a manifest error hath happened, to the great damage of the said John Neel, administrator as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of May next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

Seal of the Circuit Court, Northern Dist. of Ohio.

IRVIN BELFORD,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

Allowed by—
——,

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Pennsylvania Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the twenty-fifth day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the northern district of Ohio, wherein John Neel, administrator of the estate of Tobias Cline, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Augustus J. Ricks, district judge and one of the judges of the circuit court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and ninety-one.

AUGUSTUS J. RICKS,
U. S. Dist. Judge, N. D. O.

Returned and filed Apr. 29, 1891.

IRVIN BELFORD,
Clerk U. S. Circuit Court.

On this 28th day of April, in the year of our Lord one thousand eight hundred and ninety-one, I delivered a true copy of the within citation to J. R. Carey, attorney of record of the within-named The Pennsylvania Company.

B. F. WADE,
U. S. Marshal,
By G. W. WYMAN, *Deputy.*

Service	$2 00
Copy	50
	$2 50

40 And afterwards, to wit, on the 25th day of April, A. D. 1891, an assignment of errors was filed in said cause; which assignment of errors is in the words and figures following, to wit:

In the Supreme Court of the United States.

JOHN NEAL, Administrator of the Estate of Tobias Cline, Deceased, Plaintiff in Error, *against* THE PENNSYLVANIA COMPANY, Defendant in Error. } Assignment of Errors.

The above-named plaintiff alleges that at the October term of the United States circuit court for the eastern division of the northern district of Ohio, in a suit pending therein, wherein John Neal, administrator of the estate of Tobias Cline, dec'd, was plaintiff, and The Pennsylvania Company was defendant, the said Pennsylvania Company, defendant herein, by the consideration of said court, the Honorable Augustus J. Ricks, district judge, presiding, obtained a judgment against John Neal, administrator of the estate of Tobias Cline, dec'd, plaintiff herein, for the costs of said suit, taxed at $—, as will appear from the transcript of the record of said cause herewith filed.

Plaintiff says that there is error in said record to his prejudice in this, to wit:

First. The said circuit court erred in sustaining the motion of the defendant in said action to direct the jury to return a verdict for the defendant, The Pennsylvania Company.

Second. The circuit court erred in directing the jury to return a verdict for the defendant, The Pennsylvania Com-
41 pany.

Wherefore plaintiff herein, for said errors, prays this honorable court to reverse said judgment and to restore to the plaintiff herein all that he has lost thereby.

D. DIRLAM,
Att'y for Plaintiff in Error.

(Endorsed:) John Neal, administrator of Tobias Cline, dec'd, *vs.* The Pennsylvania Company. Assignment of errors. Filed April 25, 1891. Irvin Belford, clerk U. S. circuit court.

42 UNITED STATES OF AMERICA, }
Northern District of Ohio. }

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record in the cause wherein John Neel, administrator of the estate of Tobias Cline, deceased, is plaintiff and The Pennsylvania Company is defendant, as the same appears from the files and records of said court now remaining in my custody.

Seal of the Circuit Court, Northern Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in the city of Cleveland, in said district, this 18th day of May, A. D. 1891, and of the Independence of the United States of America the 115th year.

IRVIN BELFORD, *Clerk.*

Endorsed on cover: Case No. 11,668. N. Ohio C. C. U. S. No. 188. John Neel, administrator of Tobias Cline, deceased, plaintiff in error, *vs.* The Pennsylvania Company. Filed June 1, 1891.

188
15-1-153

Office Supreme Court, U. S.
FILED.
OCT 6 1894
JAMES H. McKENNEY,

In Supreme Court of the United States.

JOHN NEAL, ADMINISTRATOR OF TOBIAS CLINE, DECEASED,
Plaintiff in Error,

vs.

THE PENNSYLVANIA COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

DARIUS DIRLAM, *Attorney for Plaintiff in Error.*

Geo. A. Holm & Bro., Printers & Binders, Mansfield, O.

In Supreme Court of the United States.

JOHN NEAL, ADMINISTRATOR OF TOBIAS CLINE, DECEASED,

Plaintiff in Error,

vs.

THE PENNSYLVANIA COMPANY,

Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

At 8:30 o'clock P. M., of October 6th, A. D. 1887, Tobias Cline was run over and killed at the crossing of the defendant's railroad on Bloom Street, in the City of Mansfield, in the State of Ohio.

Bloom Street runs east and west. Defendant's railroad crosses it at an angle of something less than forty-five degrees from a southeasterly to a northwesterly direction.

There are two tracks at the crossing, one a siding to allow meeting trains to pass, which is the most easterly, the other the main track, the most westerly.

A few minutes before the accident a freight train had gone over the crossing on the main track to the east, and at the time the decedent, Tobias Cline was killed, a freight had just cleared the crossing on the siding going west, or had about cleared it.

Cline was approaching the crossing on foot on Bloom Street from the west; as he reached the westermost track he was struck by the rearmost of two or three box cars which were being pushed ahead of a shifter following the east bound train, and reaching the crossing at just about the time the west bound train cleared it. The box car next to the shifter was so close to it as to prevent the head-light from being seen at any point but at a point sixty or eighty feet west of the crossing. A witness testifies that the reflection of the head-light could be seen thrown out to the sides. The testimony tends to show that there was no light of any kind on any part of the box cars, and that no person was on them; that therewere at least two persons with lanterns on the shifter, one near the front, the other at the rear. The crossing was a busy one, in the heart of the manufacturing portion of Mansfield, a City of about 14,000. The railroad tracks immediately north of the crossing ran between two manufactories, The Bending Works on the west, and The Schreidt & Miller Works on the east.

There was a bridge across a ditch on defendant's right of way, west of its western track, but it was so short that it only crossed that portion of Bloom Street that was used by teams and the ditch was left open

across the sidewalks. The crossing had a plank beside the rails and the rest filled up smooth.

The shifter was pushing the box cars at the rate of from 18 to 20 miles per hour. No one discovered that the car had struck Cline, and the shifter passed over him, and went to a warehouse further east, disposed of its box cars, returned, backing the shifter over the body again, without seeing it. The body lay about 30 to 40 feet east of the crossing, but his hat and pocketbook were at about the middle of the crossing, and plain marks showing that he was dragged between the rails for that distance.

The administrator of Cline brought suit in the State Court, under Section 6134 of the Revised Statutes of Ohio, which was removed by defendant to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio, and there tried to a jury. The plaintiff on the trial gave evidence to the jury tending to prove the above recited facts, as to the circumstances of the killing, and that it was dark, (moon rising that night at 8.23 P. M.,) that two men saw Cline from 60 to 80 feet west of the crossing, going towards it, that at that time the shifter was seen by one of them about 300 feet west of the crossing, and that there was no obstruction from that on, between where Cline was going and the track at the crosing, with other details, and rested his case.

Thereupon, defendant made a verbal motion to the court to direct a verdict for the defendant, on the sole ground that the evidence introduced by the plaintiff established such negligence on the part of the decedent as in law precluded the plaintiff from recovering; and

the court sustained said motion, on the sole ground that the evidence adduced and given to the jury established such contributory negligence on the part of the decedent contributing to his death; that as a matter of law plaintiff could not recover; but also found that on all the other branches of the case plaintiff's evidence entitled him to go to the jury. Plaintiff at the time excepted to the ruling of the court in sustaining said motion, and thereupon the court directed a verdict for the defendant, on the sole ground that the plaintiff had in law established the contributory negligence of the decedent; plaintiff at the time excepted to said direction of the court; a verdict was retured for defendant, and judgment rendered thereon. A bill of exceptions was allowed at the term containing all the evidence as to the death of said Cline, and this proceeding in error prosecuted.

For assignments of error, see page 24, printed record.

For petition below, see pages 1 to 3, inclusive.

For answer of defendant, see page 8.

For amendment to same, see page 10.

For plaintiff's reply, see page 9.

For the testimony in the case, see pages 15 to 19, inclusive.

For map of locality, see exhibit between pages 20 and 21.

For opinion of court in directing the verdict, see pages 20 and 21.

ERRORS ASSIGNED.

The errors assigned and relied upon are:

First. "The said Circuit Court erred in sustaining

the motion of the defendant in said action to direct the jury to return a verdict for the defendant."

Second. The Circuit Court erred in directing the jury to return a verdict for the defendant.

Practically, it is a single assignment, "that the Circuit Court erred in directing a verdict for the defendant, and will be so treated."

ARGUMENT.

The contention of the plaintiff is, that the evidence adduced by the plaintiff below did not establish the contributory negligence of the decedent, nor did it tend to establish it, but strongly tended to disprove it by showing that the gross negligence of the defendant was the sole efficient cause of the death.

That the gross negligence of the defendant was such as fully to account for and explain the sequel and every incident connected with it.

That by the testimony they are joined together as cause and effect, and there is no room to wedge in a contributing element.

That the acts shown would certainly deceive and entrap to his destruction the careful traveler, circumstanced as decedent was; that there is no necessity for inquiry as to why he did not escape and ward off the consequences of the criminal negligence of the defendant.

Forty years of the experience of mankind has shown that running railroad trains in the manner, and with the surroundings shown in this case is sure to produce

death; not in a single and exceptional case—the victims so slaughtered would fill whole graveyards.

Before examining in detail the decision of the Honorable Circuit Court, I will cite cases which I conceive establish the well settled and not disputable rules of law governing the case. Mr. Justice Swayne in Schuchardt vs. Allen, 1st Wall, 359, as to when a court may direct a verdict, says:

"Where there is no dispute about facts, and the law arising upon them is conclusive against the right of the plaintiff, to recover, it is proper for the court so to instruct the jury." Citing Toland vs. Sprague, 12 Pet. 309.

"If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly." Quoting from Parks vs. Ross, 11 of How, 362: "This practice has in many states superceded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules."

"A demurrer to the evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

"Where the evidence, or any part of it, if believed by the jury is decisive of the case, it is proper for the court to instruct the jury to that effect." Citing Bliven vs. Screw Co., 23 How, 33. In Pawling vs. The United States, Chief Justice Marshall uttered the following: "The party demurring admits the truth of the testimony to which he demurs and also those conclusions of fact which a jury may fairly draw from the testimony; forced and violent inferences, he does not ad-

mit; but the testimony is to be taken most strongly against him and such conclusions (against him) as a jury might justifiably draw, the court ought to draw."

In Barney vs. Schmeider, 9 Wall. 248, a verdict was directed for the plaintiff, and in the opinion of the court, reversing the judgment below, Mr. Justice Miller says: "It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without responsibility." A remark very applicable to the case at bar. But I quote further: "The judge (below) also tells us that 'there is very little discrepancy in the testimony.' But where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony, and not the court's. The proposition is not therefore, sustained, that nothing but a question of law was to be decided."

(There were marked discrepancies in the testimony in the case at bar as to material facts.)

In Moulor vs. Insurance Company, 11 Otto, 708. Headnote. "Where the evidence as to the truth of the statements in an application for insurance is conflicting or doubtful, it must be submitted to the jury, and the court cannot direct a verdict."

Opinion by Mr. Justice Strong: "We are of the opinion that this evidence did not warrant a peremptory instruction to the jury to find a verdict in

favor of the defendants. The testimony of Dr. Mathieu was parol. Its credibility as well as its effect was for the jury especially, as it was not positive and unqualified that Moulor had had the diseases for which the witness treated him." The jury might perhaps have drawn the conclusions from Dr. Mathieu's testimony that there had been only predisposition to the diseases, and not the diseases themselves. That he was treated for them is not conclusive that he had them."

The Insurance Co. vs. Doster, 16, of Otto, 30.

Mr. Justice Harlin, for the court, says:

"The motion at the close of the plaintiff's evidence for a peremptory instruction for the company was properly denied. It could not have been allowed without usurpation, upon the part of the court, of the functions of the jury; where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law invoked. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict." Citing Greenleaf vs. Birth, 9 Pet, 299. U. S. vs. Lamb, 12 Pet, 5. Weightman vs. Washington, 66 U. S. 57. Bank vs. Guttschlick, 14 Pet, 31. Bevans vs. U. S., 13 Wall, 62. Hendricks vs. Lindsey, 93 U. S., 146.

But some of these citations were when the rule in the federal courts was, if there was any testimony—a scintilla—to submit the question to a jury and seek a remedy by motion for a new trial; but it would seem

that the court adopting the modern rule regarded the doctrine laid down in the cases cited authoritative.

Klein vs. Russell, 19 Wall, 433. When a court may direct a verdict. Headnote 1.

"Where it is entirely clear that the plaintiff cannot recover, it is proper for the court to direct a verdict for defendant, but not otherwise"

Railroad Company vs. Stead, 5 Otto, 161.

If this case is the law, and plaintiff was entitled to go to a jury, the plaintiff certainly should have been permitted to do likewise in the case at bar.

Marshall vs. Hubbard, 117, U. S., 415.

"Giving the defendant the benefit of every inference that could fairly have been drawn from the evidence, written and oral, it was insufficient to authorize a verdict in his favor."

Schofield vs. Railroad, 114, U. S., 615.

"It is the settled law of this court that when the evidence given at the trial with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside; the court is not bound to submit a case to the jury, but may direct a verdict for the defendant."

Railroad vs. Houston, 5 Otto, 697.

Where it is held that a verdict might have been

directed for the defendant, went off on an improper charge as to the crossing, when it was conceded she was not on the crossing.

Railroad Company vs. Hurst, 93 U. S., 291.

Holds that contributory negligence is a defense, and that the burden of establishing it rests upon the defendant, and must be established by a preponderance of evidence; that although the defendant may establish it by the plaintiff's evidence he must still establish it by a preponderance.

Railroad vs. Gladman, 15 of Wallace, 401.

Mr. Justice Hunt. Request by defendant. "If the jury finds from the evidence that the plaintiff's injuries resulted from his attempt to cross a street in front of an approaching car driven by an agent of defendants, the burden of proof is on the plaintiff to show affirmatively, not only the want of ordinary care and caution on the part of the driver, but the exercise of said care and caution on his own part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident or even contributed to it, or that it could have been avoided by the exercise of due care on his own part, then the plaintiff is not entitled to recover, whether the driver of the car was guilty of negligence or not, but the jury must find for defendant."

As applied to adult parties the first branch of this proposition is not correct; while it is true that the

absence of reasonable care and caution on the part of one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution.

The want of such care or contributory negligence as it is termed is a defense to be proved by the other side.

The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof and his case is made out. If there are circumstances which convict him of concurring negligence the defendant must prove them and thus defeat the action. Irrespective of statute law on the subject the burden of proof on that point does not rest upon the plaintiff."

Railroad vs. Ives, 144 U. S., 408.

Defendant requested the following charge which was refused: "If you find that the deceased might have stopped at a point 15 or 18 feet from the railroad crossing and there had an unobstructed view of defendant's track either way, that he failed to stop, that instead the deceased drove upon the defendant's track watching the Bay City train that had already passed, and with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant."

This was refused, although the undisputed evidence showed that the injury occurred in that manner, and very properly, because although the jury might find these facts, yet there were other circumstances that might qualify them and the jury could not be directed

to draw the inference of negligence from them alone if admitted; where there might be other facts which might change their probative effect.

"Contributory negligence in the deceased, in an action against a railroad company for causing death, by its negligence is a question for a jury."

Where a party is alive and able to bring before the jury his actual conduct, a court may be in a position to direct a verdict on his own admission.

But an administrator who must rely upon presumptions, especially where no eye saw the accident, and the actual conduct of the plaintiff, or what induced it cannot be known, a court never does, and never should draw the inference of negligence, as long as we pretend to have jury trials.

Mr. Justice Lamar refers to the case of Sullivan vs. Railroad 28th, N. E. Rep., 911, a Massachusetts case. The railroad track had been raised higher than the sidewalk; grading unfinished, crossing in a broken condition, (so in the case at bar, ditch across it).

"View somewhat obstructed by buildings." In case at bar shadow of buildings hanging over track on either side, as well as direct obstruction from Bloom street east of Bending Works; a team, a load of lumber, and two men. It would seem if a recovery can be had for having been injured in broad daylight where, if the party had looked the train might have been seen three to five times further; this case should not have been taken from the jury where the train probably could not have been seen at all, or if at all, very obscurely.

At bar in that case it was strongly urged that the

judgment below could not be affirmed without doing violence to the doctrine announced in the Railroad Company vs. Houston, 95 U. S., 697. Schofield vs. The Railroad Company 114, U. S., 615, and The Railroad Company vs. Converse 139, U. S., 469, or the cases in Michigan, cited, but the court held that the judgment might be and was affirmed without in any manner conflicting with these cases.

Coasting Company vs. Tolson 139, U. S., 551.

Court directed the jury, that if the defendant did certain acts it made a *prima facie* case of negligence, and submitted the question of contributory negligence to the jury; holding the burden was upon it to establish it as a defense; citing with approval Railroad Company vs. Gladman, 15 Wall, 401; Railroad Company vs. Hurst, 93 U. S., 291; Hough vs. Railroad Company, 100 U. S., 213; Railroad Company vs. Mares, 123 U. S., 710.

Railroad vs. Amito, 144 U. S., 465. The conduct of the plaintiff in that case would come very much near establishing contributory negligence as a matter of law than the conduct of the deceased in the case at bar.

The plaintiff below was crossing a bridge over the river on a single track, but so constructed that he could step aside and let a train pass, he was at the middle of the bridge when he met the train, nothing to prevent his seeing the train except the curve in the bridge which we all know could not have been so short as to have hid the train for a considerable distance before it struck him. Did not see the train until it was right

onto him; was from 5:30 to 6:00 o'clock P. M.; his only excuse for being where he was and not looking out for danger was that the working boss told him that the usual train that took them over would not come and they would have to walk over; that no train would pass over until about seven or half-past seven o'clock P. M.

He fell on a slippery track in his scramble to get out of the way; admitted that if he had seen the train he would have stepped aside, that it was coming in front of him, right around the turn but he could not see it; that he did not see it till it was on top of him. Admitted on cross examination that he never thought of an engine because the boss told him there was nothing to come across and he was walking at his ease without thinking of anything.

A request was made to the court to direct a verdict for the defendant on the ground that the plaintiff was negligent, but this court sustained the court below in refusing to direct a verdict, and in the opinion is the following: "We concur also with the view of the Circuit Court of appeals in the opinion of that court given by Judge Locombe that it was fairly a question for the jury to determine whether or not it was negligence on the part of the plaintiff not to keep a lookout for a coming engine in view of the assurance of the boss that there was none to come and that the case is quite within the decisions in Bradley vs. Railroad, 62 N. Y., 99; Oldenburg vs. N. Y., 124 N. Y., 414.

Railroad vs. Mares, 123 U. S., 710. Second headnote: "That the court was right in refusing to give

peremptory instruction; that if plaintiff knew, before his injury, of the unfitness of the engineer it was plaintiff's duty to refuse to work with him any longer, and that his failure to do so would prevent his recovery. It was for the jury to say, from all the attending circumstances, whether the plaintiff's failure to do so was, in fact, contributory negligence."

Third: "It was not error for the court to charge the jury that the plaintiff had a right to suppose and assume that the railroad company had used proper diligence and care in the employment and retention of an engineer."

Fourth: It was not error for the court to charge that the defendant having alleged negligence on the part of the plaintiff denominated contributory negligence it must be established by a preponderance of evidence to warrant the jury in finding it."

Railroad vs. Powers, 149 U. S., 43. "Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

"Where deceased, a passenger, was going from defendant's train, at a station in the evening, and a train from the opposite direction, at a rapid speed, without warning ran upon him and killed him, these facts tend to establish due care on his part, and the case was prop-

erly submitted to a jury." Why do not the facts in this case tend to establish due care on the part of Cline?

Railroad vs. McDade, 135 U. S., 554.

Request to direct a verdict for defendant overruled.

"As a general rule, the question of contributory negligence is one for the jury under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is, that from which fair minded men may draw different inferences."

Kane vs. Railroad, 128 U. S., 91.

Case taken from the jury in an action for personal injuries to plaintiff, a brakeman on defendant's railway, where he fell from a car and was injured by reason of a step off from the car, which he discovered to be missing, and which car the conductor had promised to drop out of the train, if it did not contain perishable freight.

Held: The question of contributory negligence should have been submitted to the jury.

"In determining whether an employe has recklessly exposed himself to peril or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position and to all the circumstances of the particular occasion."

Fifth: "The court erred in not submitting to the jury to determine whether the plaintiff in forgetting or not recalling at the precise moment the fact that the car

from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery."

Mr. Justice Harlan: "In the case before us the jury may not unreasonably have inferred from the evidence that while the plaintiff was passing along the tops of the cars for the purpose of reaching his post he was so blinded or confused by the darkness, snow and rain, or so affected by the severe cold that he failed to observe in time to protect himself, that the car from which he attempted to let himself down was the identical car which during the previous part of the night he had discovered to be without its full complement of steps." See facts in this case.

Manchester vs. Erickson, 15 Otto, 347.

In an action against the City for an injury to plaintiff, occurring by reason of an approach to a bridge being out of repair, the question whether the City had assumed such control of the approach as to make it responsible is an inference of fact to be drawn from all the testimony by the jury, and not a question of law for the court." See opinion. Case reversed because the court drew the inference that the City had assumed the care of the approach.

"The City is liable unless it proves that the plaintiff sustained his injury through his own neglect."

Insurance Company vs. Lathrop, Adm'r., 111 U. S., 612.

"The rule re-affirmed that a case should not be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court in the exercise of a sound legal discretion to set aside a verdict in opposition to it." Request was made to take from the jury and denied.

Insurance Company vs. Rodel, 5th of Otto, 232.

Third headnote: "Upon the issue of the insanity of the insured if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death the judge could not properly take the evidence from the jury."

Jones vs. Railroad Company, 128 U. S., 443.

First headnote: "In an action to recover damages against a railroad company for personal injury to plaintiff by his being struck by an engine, where it appears that he was in the depot of defendant on business; that the passenger platform was alongside the track which ran between it and the depot; that there was also a side track that went through the depot; that he passed out of the depot by the usual way and was struck between the walls of the depot and the platform; that he could not see a train approaching because there was a car on the side track, and he had no warning of any approaching train although he listened as he went out of the depot, and there was evidence that there was so much noise about the place of exit from

the depot that the sound of the advancing train could not be distinguished; and, on the other hand, some testimony to show that the plaintiff ran carelessly through the depot; that he knew the train was approaching and might have guarded himself against it if he had stopped and looked. Held, "that the question of contributory negligence of the plaintiff was a question for the jury to determine."

Second: "In a case where it is conceded that the defendant company is in fault on account of the manner of running its trains, such as the high rate of speed, and the imperfect condition of their brakes; this court is not justified in refusing to submit to the jury the question whether the defendant company is relieved from liability incurred by it by reason of the acts of plaintiff, showing that in some degree he may not have been as careful as the most cautious and prudent men would have been."

Third: "So long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact there is no reason why it should not decide such questions as these." Case was taken from the jury below. Judgment reversed on that ground.

Elliot vs. Railroad, 150 U. S., 244.

In broad daylight where there was but two tracks no substantial obstructions of any kind, only a depot and car house, no standing cars, day clear, nothing to prevent the deceased from seeing all that was going

on; was foreman of section hands, been working on track ten years, knew the train was coming, and in switching rear section struck him. Held: That in law his conduct brought his injury upon himself and his representatives cannot recover.

Gardner vs. Railroad, 150 U. S., 394.

Servant injured by reason of hole in planking, night time when he was ordered to couple, as he claimed, case taken from the jury in court below. Mr. Justice Fuller, for the court: "Upon the whole we see no ground for excepting this case from the rules governing other cases involving questions of fact."

"The question of negligence is one of law for the court only where the facts are such that all reasonble men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had, upon any view which can be properly taken of the facts the evidence tends to establish." Citing Grand Trunk vs. Ives, 144 U. S., 408. Railroad vs. Cox, 145 U. S., 593. Judgment reversed for taking case from the jury.

Railroad vs. Cox, 145 U. S., 593.

Ninth headnote: "In a suit for damages for death, caused by negligence, the case should not be withdrawn from the jury unless as a matter of law, no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Dunlap vs. Railroad, 130 U. S., 649

Engineer injured by defective road-bed which he had run over before. Case taken from the jury.

Held: Chief Justice Fuller: "The question of contributory negligence should be submitted to the jury where the conclusion does not follow as a matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish."

Gardner vs. Birth, 9th of Pet., 292. It was said by Mr. Justice McLean: "It is the province of the jury to weigh and decide on the sufficiency of the evidence."

"Where there is no evidence tending to prove a particular fact (and a scintilla has no probative effect) the court is bound so to instruct the jury when requested, but they cannot legally give an instruction which shall take from the jury the right of weighing the evidence and determing what weight it shall have."

Railroad vs. Converse, 139 U. S., 469.

Facts. Physician had been in the habit of going over the crossing daily for ten years on a McAdam road thirty feet wide, no fences, two main tracks and five others, two on the south, three on the north; the road commonly called the county road runs through the meadow lands except as occupied by the railroad. There is substantially no travel upon it except by those going to the county farm. About one-half dozen

vehicles, on an average, pass it every day. Time, 13th of March, 8 o'clock P. M.

Plaintiff below approached the crossing with top of buggy up, moving at an easy gait (trot). Discovered train of freight and locomotive coming from west just about 100 feet away; just before it reached the crossing the train was cut to make a running switch; and on the front car of the rear portion on a shelf, about two feet from the top of the car, a lighted lantern was set but the wind blew it out, and there was a light in the caboose. As the locomotive with twelve cars pulled over, plaintiff below attempted to cross immediately behind them, driving into the gap between the two and was caught. Gap, about ninety feet wide; both running one way.

No light, no watchman, no gate; plaintiff below did not see rear of train until it was onto him. Held, that the defendant below was not entitled to go to the jury on its negligence, the facts conclusively establishing it, but was entitled to have the contributive negligence of it, the plaintiff submitted to the jury, and that it was not a proper case to be withdrawn from a jury on that question.

17th Michigan, 99, contains an elaborate discussion on the state of the evidence on which a verdict may be directed.

Railroad Company vs. Stout, 17 Wall, 657.

Turn table case. Facts all undisputed. Headnotes.

"If upon any construction which the jury is authorized to put upon the evidence or by any inference they are authorized to draw from it, the conclusion of negli-

gence can be justified, the defendant is not entitled to a nonsuit, but the question of negligence must be left to the jury."

"This court is not called upon to weigh or balance the evidence, or decide how it would have decided the case, if acting as a jury."

"Although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given and whether they established negligence."

Railroad Company vs. Weber 76 Pa., State, 15. Rep. in 18 Am. R., 407. "A person killed at a crossing is presumed to have used the requisite caution. The burden of proof is upon the railroad company to prove contributory negligence."

Randall vs. B. & O., 109 U. S., 478.

Fellow servants injured by standing on track lifting handle of switch. Verdict directed for defendant because fellow servant, and because as a legal inference from the facts, plaintiff could not recover.

First headnote: "When the evidence given at the trial with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant."

Mr. Justice Gray: It is the settled law of this court that when the evidence given at the trial, with all infer-

ences that the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff; so that such a verdict, if returned, must be set aside; the court is not bound to submit the case to the jury, but may direct a verdict. Citing Pleasant vs. Fant, 22 Wall, 116; Herbert vs. Butler, 97 U. S., 319; Bowdwitch vs. Boston, 101 U. S., 16; Griggs vs. Houston, 104 U. S., 553. No negligence on part of defendant. "It is for the court to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts submitted to them, negligence ought to be inferred." Citing Railroad Company vs Jackson, 3rd App. Cases, 193, English.

Merchants National Bank of Boston vs State National Bank of Boston, 10 Wall, 64.

Court directed a verdict for defendant on the ground that the cashier of a bank, away from its place of business, had no apparent authority to bind his principal by certifying a check of a third party as good without his bank receiving the proceeds. Held, that it was error and two questions should have been left to the jury.

First: "Whether the bank received the gold in controversy."

Second: "Whether from the evidence as to the power exercised by the cashier with the knowledge and acquaintance of the directors and the usages of other banks in the same city, it might not be fairly inferred

that the cashier, Smith, had authority to bind the defendant by a contract which he made with the other bank."

Railroad vs. Farloff, 10 Otto, 24.

An extreme case. The court as a matter of law cannot determine whether laces, etc., of the claimed value of $75,000.00 are baggage; it must be left to the jury. Justices Field, Miller and Strong dissenting.

Steward vs. Lansing, 14 Otto, 505. Taken from jury; question of bona fide holder.

Sixth Headnote: "If the court is satisfied that conceding all the inferences which a jury could justifiably draw from the testimony the evidence is not sufficent to warrant a particular verdict, the jury may (should) be so instructed."

Gregg vs. Houston & Company, 14 Otto, 553.

Second headnote: "Where upon the evidence, if the jury had brought in a verdict against the defendant it would have been the duty of the court to set it aside and grant a new trial, the court may (should) direct a verdict for the defendants."

Arthur Collector vs. Jacoby, 13 Otto, 677. Porcelain pictures. Second headnote: In a case where if the jury had found a verdict in favor of the defendant the court should have set it aside as against what is admitted to have been proved, a judgment will not be reversed on account of a positive instruction to find for the plaintiff.

Bowditch vs. City of Boston, 11 Otto, 16.

Blowing up houses to stop fire; Construction of Statute.

First headnote: "In the courts of the United States whenever in the trial of a civil case it is clear that the evidence will not warrant a verdict for a party, and that if such verdict is rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find for the party entitled to its verdict."

Baltimore and Ohio R. R. Co. vs. Jones, 5 Otto, 439.

Unnecessarily riding on the pilot of an engine when there is a safe place provided is in law negligence.

Town of Grand Chute vs. Wineger, 15 Wall, 355.

First headnote: "It is not error for a Judge to direct a jury to find an issue for the plaintiff where, if the jury had found otherwise, it would have been the duty of the judge to set aside the verdict as unsupported by the evidence, and in hostility to all the evidence given."

Marion County vs. Clark, 94 U. S., 278.

Bond case. First headnote: "Judges are not required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to find a verdict in favor of the party introducing the evidence;

citing with approval Giblin vs. McMullen, L. R., 2 P. C. Appeals, 235; Improvement Company vs. Munson, 14 Wall, 448; Pleasants vs. Fant, 22 Wall, 120; Merchants Bank vs. State Bank, 10 Wall, 637; Parks vs. Ross, 11 How, 373; Hickman vs. Jones, 9 Wall, 201.

Second: "The admission of defendant, and the deposition to the effect that defendant had procured for R a loan of money to be used in a purchase of cotton, and that R had voluntarily promised to give defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, does not raise a presumption of partnership."

Third: "Nor is such evidence sufficient to require the court to submit the question of partnership to a jury, and its instructions to find for defendant was right, for such instruction is right where the court would decide for defendant on a demurrer to all the evidence, and the true rule in the case is, that if to the judicial mind the evidence tested by the law of the issue and the rules of evidence is not sufficient to justify a jury fairly and reasonably in finding a verdict for plaintiff, the court should so tell the jury."

Fifth: "If the court can see that if a verdict for plaintiff should be rendered it ought to be set aside as being unwarranted by the testimony, instructions to find for the defendant should be given in advance of the verdict. Question of partnership was a question of law only."

Herbert vs. Butler, 97 U. S., 319.

Second headnote. "Where the burden of proof is on the plaintiff to sustain the issue, and the evidence does not sustain it on his own part, but the only direct evidence is to the contrary, the judge may properly direct the jury to find for the defendant."

Improvement Company vs. Munson, 14 of Wall, 442.

Case went off upon a void survey.

Second headnote. "Judges are not required to submit a question to a jury unless there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Schucardt vs. Allen. Rule of taking from the jury is the same as demurrer to the evidence.

Having somewhat tediously gone over some of the leading cases in this court as to when and when not a verdict may be directed; and keeping in mind another rule that negligence is not, but care is presumed until the contrary appears, I go to the discussion of the reasons given by the Honorable Circuit Court for its decision in directing a verdict for defendant, (page 20 of record) and therein we find the following: "And it appears very evident to me that the plaintiff on approaching defendant's tracks at this crossing had a full and fair opportunity of both hearing and seeing trains approaching from either direction.

"The testimony of the witnesses, Hunt and Dice, shows

that, although engaged in their occupation of unloading and re-loading lumber, they distinctly heard the freight train approaching on the siding from the east, and Hunt saw the shifter coming down the main track from the west." I submit that in the main these are merely inferences, drawn by his Honor, unsupported by and contrary to the testimony.

I protest that there is not a word of testimony that Hunt at any time heard any of the trains (see his testimony on pages 16 and 17 of record).

There is no evidence that Dice heard any of the trains until the shifter was within forty feet of the crossing. (See his testimony, page 17, record).

Right here we have this wonderful discrepancy in the testimony. Hunt, at the time Cline passed them, puts the shifter 300 feet west of the crossing. Dice puts it forty feet west of the crossing. (See page 17).

Hunt fixes the time, after he saw Cline, at three or five minutes until he heard he was killed.

Dice. "It was five or six minutes from the time the man passed me until the shifter passed over the crossing." (Page 18). I urge that it was not within the province of the Court to determine that Cline was so situate that he could have heard the trains, even though Hunt and Dice had testified that they did hear them.

If the position of Cline was important when the shifter had reached a point 300 feet west of the crossing, who is to reconcile the testimony? If Dice is correct, Cline must have been west of the Bending Works at that time about two hundred feet.

But if Hunt was correct, where was Cline? Was he eighty feet from the crossing, or was he only sixty?

Had the Court the right to determine, or was it a question for a jury?

If both Dice and Hunt had testified that they could distinguish the noise of the shifter from that of the freight, the Court could not draw the conclusion that Cline could do the same, because it was improbable.

The freight train with its 20 to 25 cars, and its freight engine, probably an eight-wheeler, ponderous and constructed to draw the immense modern loads, with its long stroke and heavy exhaust, would raise a din and clatter that would drown any noise that the little shifter would make; with its short stroke and light load, its movement would be comparatively noiseless and could not be distinguished by sound; much less had the court a right to determine that question on the evidence as it stood.

Was it competent for the court to draw the conclusion that because Hunt testified that he saw the shifter, that Cline was negligent in not seeing and avoiding it?

I contend not. It is not a legal inference from the facts which the testimony tended to prove. It was an inference, if to be drawn at all, to be drawn from a variety of circumstances, each having more or less probative effect, and it cannot be said that just, impartial minds would concur.

It was important to ascertain just the position that the team, the load, and the men occupied east of the Bending Works, and what light they had, and what obstruction they would present being between him and the tracks.

Were the wagon and team sidewise or endwise to the street? In measuring the distance from the track

do you measure from that portion of the outfit that was nearest or farthest from the track, and do you take sixty or eighty feet for the distance? Where did Hunt stand with reference to the team or wagon and in what relation to him and the other objects was Cline when he was said to be eight feet away? Where was the shifter at this particular time, was it 300 or forty feet west of the crossing?

But these present only a small part of the difficulties in solving the problem.

How dark was it? It was sometime before 8:30 P. M. if Cline's watch told the truth; all effects of daylight were gone at that time. Was it starlight or was it cloudy? For the moon had not yet come over the hills east of Mansfield. It arose that night at 8:23 P. M. (see almanac). Could the train be seen by natural light or was artificial necessary? If artificial, from what source did it come? The oil or gas lamp somewhere about the crossing, was that between Cline and the cars? If so, would it aid to blind him? I contend that the fair inference from the facts which the testimony tended to prove is that Cline could not, and did not in the exercise of ordinary care see the shifter or the cars it was pushing, and the background and the respective position of the trains were very important.

For background, as far as the Schridet and Miller hardware factory runs north, you had the walls of that building in deep shadow; when you could see past them you had the Erie yards and the union depot, the telegraph towers, and all the illumination incident to the business there carried on.

Place yourself as Hunt was placed and you see the shifter coming down the track with these lights for a background—stationary, but showing every movement of the object passing between them and the observer: a prominent object in the field of vision. It comes down to within 300 feet of the crossing and a larger, taller and more prominent object runs between it and the light, to-wit: a large freight engine and its cars and the little quill-wheel engine and its two or three cars are absorbed and blotted out by it.

Cline arrives on the scene at this time, and what does he see? He sees the larger object outlined and passing rapidly in front of the lighted background, and the lanterns on top of the train rapidly flitting by the stationary lights shows it as a single train going west.

The little train is as completely engulfed by the larger as if it had been swallowed up in the earth. Not even lanterns on top to show the counter running. To make the shifter certainly invisible the square end of a box-car is backed up against its headlight. The color of the train between it and the light is the same as the shifter, and it comes gliding down upon its victim with no audible sound, through the shadow of the hardware factory, invisible, and tramples out his life.

When the artist paints the white dove, he paints it on a dark backgroud that it may be seen; if he paints on a background of the same color as his picture, he makes an invisible painting.

I urge that no inference of negligence under the circumstances arises, because the decedent did not pene-

trate the shadows and discover the shifter masked and obscured as it was.,

We all know the uncertainty of vision in the night. When we are young the eye responds quickly to the light, and placed as Hunt was, having been in the darkness so long that his eyes had adjusted themselves to it, he could see objects quite distinctly, especially as he had been on the ground when each of the three trains were moving independent of the others, and knew just where they were; besides he was standing still and the shifter was moving across his horizon, while with Cline every step brought him nearer in a direct line with it. Cline was an old man, had come out of the brilliant light of his train and that which was at the depot where he alighted, and when he came onto the scene he saw only the most prominent objects, one of which was a freight train, made particularly conspicuous by the forward end of it passing between him and a lighted background, the rest of it in a deep shadow, or almost impenetrable darkness. Therefore, because Hunt may have seen the shifter, it does not follow that Cline was negligent in not seeing it. How can the court determine that Cline's opportunity to see was as favorable as Hunt's? In going from Bloom street into the Bending Work's yards, did Hunt go onto higher or lower ground than that which Cline passed over? If either, it would affect their respective opportunities to see, and who says they were on the same level?

His Honor says (p. 20): "And it further appears that he lived in this immediate vicinity and was familiar with this crossing and all its surroundings." The only evidence on the subject is that he lived on another

street, viz: Third street, about 3-10 of a mile away, and that there was no street going directly to the crossing, and that it was his usual route to the depot from which he was coming, and that is absolutely all the familiarity shown with the crossing or its surroundings.

His Honor cites a single clause in the petition and says: "According to this averment, while decedent was undertaking to cross defendant's tracks going eastward, a railroad train was at the time actually crossing immediately in front of him on the same track. His Honor seems to forget that the crossing on account of the angle was, from the outside of the sidewalks, about seventy feet in length, and that the freight train was about seven hundred feet long; so that the allegation is no more than that some portion of the train had not cleared the crossing when he came up. But does it follow that "a railroad train was at the time actually crossing immediately in front of him?" Not at all. If he approached the crossing at the middle there would have been sufficient space for him to have crossed in rear of the train before the last car had left the crossing, and the conclusion of the court as justifying the decision made is not tenable.

Let us suppose that he did arrive at or near the west track while the train or a portion of it was directly before him going over the crossing on the east track; how does that authorize a court, in a jury trial, to assume or find that he did not intend to cross, as soon as the train got out of the way. But the court proceeds: "It evidently was his purpose to move along defendant's tracks in the direction of his house on the main track upon which the shifting engine and cars were moving.

The marks upon the track mentioned in the testimony indicating that either just as he stepped upon the track, or after he had proceeded some little distance on it in the direction of his home, he was overtaken and struck by the shifting engine."

I contend that the conclusion, if the facts from which it purports to be drawn really existed, is a forced, unnatural and unreasonable one; and if such conclusions are to be drawn by courts in the determination of important rights of suitors, I do not know but we had better incur "the risk of having it submitted to a jury and the verdict rendered against it based upon prejudice or ignorance."

If the Honorable member of this court who originally made that observation had foreseen how it would be applied in this case, it is doubtful if it had been uttered.

There is already apparently sufficient distrust between trial courts and juries, especially in corporation cases to make the policy, of further aggravating it, by remarks from the bench that will be construed as a want of confidence in the jury, doubtful. Instead of the inferences drawn by the court from facts tended to be proved, the jury might have reasonably found that it was very dark; that when Cline arrived at the point where he could see past the Bending Works, the freight train was behind the shifter and there was an appearance of one train only, and without negligence on his part he believed that there was but a single train going west, and that he approached the crossing for the purpose and with the intent to go over it, in the rear of the train as soon as it passed him. That every step he

took towards the crossing lessened the probability that ordinary care would enable him to discover the shifter, because it would bring its motion in a more direct line towards him When he finally arrived in the immediate vicinity of the crossing, look as he would, he could see nothing of it in the gloom and darkness, as only the square end of a box-car would be facing him, and that, in the shadow of the buildings. That he would attempt to go home on the ties of the main track, when by crossing he could have a good road between the tracks, or a good road on Bloom street, is preposterous. But if that inference was to be drawn, it was for the jury. The court entirely ignores the presumption in the case that Cline was not negligent, but that the instinct of self-preservation would make him careful to avoid injury and death, precisely as it does in other men.

In Silvus vs. State, 22 O. S., 100, Mr. Justice White, after citing Clark vs. State, 12 Ohio, 494, Loeffer vs. State, 10 O. S., 599, and Commonwealth vs. Eddy, 7 Gray, 583, says: "The principle of these decisions is, that in judicial investigation facts legally presumed are, until rebutted, as effectual as facts proved." The presumed fact that the decedent was not negligent but careful was as available to plaintff as if the fact had been proved by the testimony of witnesses.

Human experience demonstrates that hauling trains as the testimony tends to prove defendant handled this one, so directly tends to the loss of life that its occurrence in no sense tends to rebut the presumption of care, but on the contrary corroborates it.

At this day, it cannot be doubted that to follow one train closely by another in the night time, the following

one backing without light or signals over a crossing in a populous city, without watchman or gates, or a person on the hind end of a train, to give warning, at the rate of eighteen to twenty miles an hour, while another train is crossing in the opposite direction, is so reckless and disregardful of human life, that it is equivalent to intentional wrong, and the doctrine of contributory negligence does not apply. Indeed a ciminal action against the operators of the switch engine should lie. It is so unreasonable to require the benighted traveler to go safely over a crossing, in the dark, and not only guard himself against falling into an open ditch, carelessly left open by defendant, guard against a visible moving train going over the crossing; and also against a backing train gliding upon him out of the darkness, without audible sound, without light, without the aid of a watchman at the crossing, or on the rear of the train, that it is not for a momet to be thought of; such conduct is in law gross, criminal negligence, and need not be submitted to a jury. When the traveler moves in the darkness, the presumption of care clothes him as with a garment.

He may rightly presume that no one will recklessly endanger his life, and while he must so shape his conduct as not to be careless as to the dangers incident to the proper use of the crossing by the railroad company, he is not bound to anticipate gross carelessness or criminality on the part of the employes of the company; nor is he required to anticipate a danger that ordinary prudence would not enable him to foresee.

In the Railroad vs. Powers, *supra.*, it was held: "Where deceased, a passenger, was going from defend-

ant's train at a station in the evening, and a train from the opposite direction, at rapid speed, without warning, ran upon him and killed him; these facts tend to establish due care on his part, and the case was properly submitted to a jury."

Why did not the facts in the case at bar more strongly tend to establish due care on the part of Cline? The decedent in that case attempted to cross in front of an engine with a blazing headlight, which was a prominent object in the night; true, the ties were covered before him so as to present the appearance of an ordinary road; same in case at bar. There was a bonfire in front of the eating-house; in case at bar there possibly was an oil or gas lamp somewhere about the crossing that would only punctuate the darkness. In that case the train must have been seen if decedent had looked. In the case at bar it is doubtful if the most careful scrutiny would have disclosed the approach of the shifter. If there had been the usual red lights, flanked by green markers, there may have been some plausibility in the claim, that if he had been careful he would have seen the box-cars, although the distraction occasioned by the probably more apparent danger may have excused him.

Then, if the circumstances in that case did not tend to prove contributory negligence, but due care, where it was light enough to see and describe every movement of the deceased, how can it be said that the conduct unseen and undescribed of Cline demonstrated contributory negligence and did not tend to establish due care? Who knows what attention it was necessary to give to keep out of the ditch? What attention to

the crossing train on the eastern track, or that he did not believe that he was west of the main track, out of the reach of possible danger? Was he on the track when struck, or was he caught by the overjutting car? Did the car suddenly loom up out of the darkness, and in his effort to escape, did he stumble and fall and was run onto, or was he west of the center of the crossing? and did the car striking him knock him to the center, and then catch and drag him? Who knows?

The defendant by its violation of his rights has killed him and deprived us of his testimony, and to some extent obscured the facts surrounding his death. The law does not require the administrator to establish the issues where the burden is upon him with more particularity than the nature of the case will permit, and it recognizes the fact that where decedent is killed in darkness without a witness, much is left to inference, and unless the inferences are indisputable, they are for the jury. Courts are much more reluctant to draw them where an administrator has established all the facts necessary to his recovery. Some consideration is given to the fact that he who knew is dead. If a case can go to a jury, under such circumstances it is imparative that it go there.

Knowing, or if it had performed its duty it would have known all the facts, it stands by concealing them and seeks to take advantage of plaintiff's inability to more clearly describe the acts of the decedent.

Court never should encourage a suitor that puts itself in that attitude.

The very fact that the evidence showing just what the circumstances were that caused this death was in

its control, and it seeking to avoid its production ought to make against it. It seeks to avoid an issue the burden of which the law has placed upon it, viz: to rebut the presumption of care with which the law shields the decdent and to establish his contributory negligence by a preponderance of the evidence. It is true if the plaintiff goes forward and by his evidence, in law establishes contributory negligence there is nothing to go to the jury, but unless he does, the plaintiff may establish the negligence of the defendant as the proximate cause of the death and rest; leaving the defendant to establish his defense by a preponderance of all the testimony heard by the jury. Plaintiff therefore prays this honorable court to reverse the judgment of the Circuit Court and remand the cause for further proceedings.

All of which is respectfully submitted,

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Attorney for Plaintiff in Error.